(27)

No. 1258

IN THE

Supreme Court of the United States

D. M. CAROTHERS, SPENCER J. SCOTT, AND LEE PRICE, A CO-PARTNERSHIP DOING BUSINESS AS ALLRIGHT PARKING SYSTEM, LIMITED,
Petitioners.

v.

CHESTER BOWLES, PRICE ADMINISTRATOR,
Respondent.

BRIEF FOR THE PETITIONERS

WALTER F. BROWN
DURELL CAROTHERS
Attorneys for Petitioners

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BRIEF FOR THE PETITIONERS

The official report of the opinion delivered in the United States Circuit Court of Appeals in this cause appears in the record on pages 126-129. So far as we know the opinion has not been carried forward into any bound volume of official reports.

Grounds on Which the Jurisdiction of This Court Is Invoked

(1) The date of the judgment to be reviewed is April 11th., 1945 (R. 130).

(2) The specific claims advanced, and rulings made, in the lower court which are relied upon as a basis of this court's jurisdiction, are as follows:

Petitioners claimed that their renting of space to a car owner and the placing of an automobile thereon

by the owner, did not constitute "storage" within the meaning of the Emergency Price Control Act of 1942 or any amendments thereto (R. 112). Said court held that it did constitute "storage" within the meaning of said Act (R. 129).

Petitioners claim that when Congress used the word "storage" in the Act it meant "storage" in its primary meaning, which is an ordinary and usual meaning in commercial parlance, the primary meaning, as given in the dictionaries, being "the delivery of goods to a warehouse or depository for safekeeping," and that unless there was a change of possession there was no "storage" within the meaning of the Act. (R. 128.) Said court denied this claim and held that a change of possession was not an element of the word "storage," as used in the Act.

The opinion of the court states that the Administrator defines "storage," as used in the Act, as "the provision of an appropriate and convenient place for commodities when not in use." The actual definition of the verb "store" is claimed by the Administrator to be "to put away for future use, especially for future consumption." Petitioners claimed that neither of these definitions correctly define the meaning of the word as used by Congress; that the first definition, quoted in the opinion of the court, is wholly inaccurate and has no basis in any dictionary; is a secondary meaning; and that if the Act means that when an owner puts his property in some place owned or controlled by him, this constitutes "storage" within

the meaning of the Act, or that when an owner puts away his own property for future use or consumption and does not change the possession or custody thereof, but puts it away on premises owned or controlled by him, this constitutes "storage" within the meaning of the Act, then the act of Congress is distorted so that rental of every building in the United States involves "storage," and there will be no business rentals which did not come within the meaning of the Act. Said court held that the Administrator's claims in this respect were correct and that Petitioners' claims were incorrect (R. 128).

Petitioners claimed that they could not come within the provisions of the Act because they merely rent real estate and furnish no services whatever to the car owner renting same or his car (R. 112), as the evidence showed (R. 3). The said court held that, regardless of these facts, the space renting did come within the meaning of the Act.

Said court held: "It may be conceded that one who merely rents a piece of ground to the owner of an automobile in order that the latter may store his car upon it, without more, is not engaged in rendering a storage service within the meaning of the Act, but is merely engaged in the renting of real estate." (R. 129). The court then says, however, "They mark off their lot with suitable spaces for the parking of automobiles. They light it, clean it and keep it in suitable condition. They provide a common entrance for the use of all those who desire to store their cars

upon the lot as well as a common means of exit. These, we think, are sufficient to stamp their operation as a storage service." Petitioners claimed that the fact that the spaces they rented were marked off on the ground and designated did not constitute a service rendered in connection with storage; that the fact that they lighted the lot, at times, cleaned it and kept it in suitable condition, also did not constitute a service to the car owner in connection with storage as contemplated by the Act; and that the fact that the renter has ingress and egress to and from the space rented does not constitute the rendition of a service to the car owner, it being merely an ordinary and necessary incident to the relationship of landlord and tenant (R. 129). Said court denied this claim on the part of petitioners.

Petitioners claimed that the holding of said court is directly in conflict with the holding of the Supreme Court in the combined cases of *Walling v. Kirschbaum Company* and *Walling v. Arsenal Building Corporation,* 316 U. S. at 526, wherein it was held that the owners of a loft building were renting real estate and not selling service.

Petitioners claimed that when Congress defined a commodity as including services rendered otherwise than as an employee in connection with the processing, distribution, storage, installation, repair, or negotiation of purchases or sales of a commodity, it meant personal services (R. 127), but said court held against this claim (R. 127).

Petitioners claimed that if they rented real estate to a car owner and also furnished some sort of service to the car owner, Congress conferred no authority upon the Administrator on the price to be charged for the rental and, if service were rendered, there being nothing in the evidence to show the rendition of services, and if the Administrator had the right to regulate the price to be charged for such services, which he apparently had not under the Act, his right to regulate is confined to the services, if any, rendered and the charges therefor; that since the Administrator has not attempted to regulate any charge for services but has attempted to regulate rental to be charged for real estate, his action is wholly unauthorized under the Act. Said court refused to sustain this claim.

(3) The statutory provision under which the jurisdiction of the Supreme Court is invoked is Title 50, Section 924 (d), U. S. C. A., App. as amended June 20th, 1944, c. 325, Title 1, Section 107, 58 Stat. 639.

(4) Since jurisdiction is expressly conferred by statute, it is not believed to be necessary to cite any cases. The Emergency Court of Appeals has decided an important question of general law in a way which is untenable and is in conflict with the weight of authority. It has also decided an important question of Federal law which has not been, but should be, settled by this court, and has decided an important question of Federal Law in a way in conflict with applicable decisions of this court, and particularly of combined cases of *Walling v. Kirschbaum Co.* and

Walling v. Arsenal Building Corp., 316 U. S. at 526.

Statement of the Case.

As stated in the opinion of the Emergency Court of Appeals (R. 126), petitioners own a lease on a lot in Dallas, Texas. By lines marked upon the lot they have divided it into 50 spaces, each large enough to hold one car. These spaces they rent to car owners at an agreed rental. The car owner rents a space, drives his car onto the space, parks and locks it and retains the key. The car remains in this space until the car owner removes it. Sometimes petitioners have a cashier on the premises to collect the rentals; sometimes they do not and the car owner deposits the correct amount of rental in an envelope provided for that purpose and drops the envelope through an opening in the office door. Petitioners never have any control over the car. It is never in their possession and they assert no dominion or control over the rented space and assume no responsibility. They never touch the car or its keys and they furnish no service whatever to the car or its owner. In fact they have nothing whatever to do with the car. The car never leaves the owner's charge, custody or control, and the owner remains entirely responsible therefor the same as if he had left it in any other space owned or controlled by him. (R. 13.)

Petitioners were charging agreed rentals for the rented spaces when the Price Administrator made an order fixing the ceiling price on such rentals and

ordering Petitioners to discontinue charging prices in excess of the ceiling rentals, the ceilings being below the charges of Petitioners for the rentals on such spaces. (R. 17-19.)

Petitioners in due time filed their protests against this order and against Maximum Price Regulation Schedule No. 165 (Services), as amended on July 1st, 1944, in so far as it undertook to regulate such rentals, if it did. (R. 1-31.) Such protests were denied by the Administrator by an order dated September 27th, 1944. (R. 102.)

On October 23, 1944, Petitioners duly filed their complaint in the United States Emergency Court of Appeals against the Administrator praying that such orders and regulations be enjoined and set aside, especially in so far as they attempted to control and regulate Petitioners' space rentals and the charges therefor. (R. 109.) This cause was heard in the United States Emergency Court of Appeals on January 29th, 1945, and decided on April 11th, 1945 (R. 130) (Opinion of the Emergency Court of Appeals, R. 126.) Said court held that the Administrator was authorized by the act to regulate Petitioners' said rental charges (R. 129) and entered judgment dismissing the complaint. (R. 130.)

The grounds on which Petitioners protested such orders and regulations in their protest before the Price Administrator and upon which they contended that same should be enjoined and set aside in their complaint in the Emergency Court of Appeals as

shown by the complaint (R. 112) and the admissions in the answer (R. 117, par. 8), are as follows:

(a) The order of the Price Administrator fixing the maximum of rentals to be charged by your Petitioners is not authorized by the Emergency Price Control Act of 1942, or any amendment thereto, or any other enactment or statute of the United States.

(b) *Park & Lock Space Rental* is not within the terms of said Act or any amendment thereto.

(c) *Park & Lock Space Rental* creates a relationship of landlord and tenant and is in no way subject to the control of the Emergency Price Control Act or any amendments thereto.

(d) Under the *Park & Lock Space Rental*, as conducted by Petitioners, Petitioners have no possession of, or control over, the automobile that occupies the space rented. Petitioners render no services whatever in connection with this space rental. Petitioners at times have no employe of any kind at the premises where the space is rented and those who rent space deposit the rental charged therefor in a receptacle provided for that purpose. At other times Petitioners have a cashier employed to whom those renting space pay in advance the charge therefor, but such cashier in no way acts as watchman or custodian and renders no services whatever in connection with the space rented or otherwise to the party renting such space, her sole authority being to collect the charges for such space rentals.

(e) It was contended by Petitioners that Maximum Price Regulation Schedule No. 165 (Services), as amended on July 1st, 1944, in so far as such regulation undertakes, if it does, to regulate the maximum price to be charged for such *Park & Lock Space Rental,* is unauthorized and invalid for the same reasons.

All of the material fact allegations made by your petitioners in their complaint in the Emergency Court of Appeals (R. 109-113) were specifically admitted by the Administrator in his answer thereto (R. 114-117).

ASSIGNMENTS OF ERROR

1. The Emergency Court of Appeals erred in entering the order dismissing the complaint.

2. The Emergency Court of Appeals erred in holding that the word "storage" was used in the statutory definition in a sufficiently comprehensive sense to include the parking by members of the public of their own automobiles upon a space rented by them for that purpose.

3. The Emergency Court of Appeals erred in holding that while "It may be conceded that one who rents a piece of ground to the owner of an automobile in order that the latter may store his car upon it, without more, is not engaged in a storage service within the meaning of the Act, but is merely engaged in the renting of real estate," still if Petitioners mark their

lot off with suitable spaces, light it, clean it, and keep it in suitable condition, and provide a common entrance for those who desire to rent space as well as a common means for exit, they are performing services for the car owners which bring them within the meaning of the Emergency Price Control Act, and that the Administrator's orders and regulations as applied to petitioners are valid.

SUMMARY OF THE ARGUMENT

I.

The Emergency Price Control Act of 1942 does not authorize the establishment of a maximum price for the rental of petitioners' *Park & Lock Rental Space* areas because:

(1) Rent control is specifically confined by the Act to the regulation of rents on *housing* accommodations with the land appurtenant thereto in defense areas where the accommodations are used for *living or dwelling* purposes. The rentals involved in this proceeding do not come within that class.

(2) The Administrator cannot enlarge the Act and cannot regulate any real estate rental not expressly covered thereby.

II.

The rental of *Park & Lock Space* areas cannot be regulated by the Administrator under the Act on the theory that such rental is a "commodity" because:

(1) Real estate is not a "commodity" within the meaning of the Act and the rental of real estate is not a "commodity."

(2) "Storage," as that term is used in the Act, means the act of a bailor in placing a commodity or commodities in the hands of a bailee for safekeeping and it does not mean the act of an owner in putting away for future use or consumption a commodity or commodities where the owner puts same away on premises owned, leased or controlled by him and at all times retains custody and control thereof, as contended by the Administrator. There is no "storage" of any cars by petitioners within the meaning of the Act.

(3) Petitioners furnish no services whatever to the car owner in connection with the rental of the *Park & Lock Space.*

(4) Even if petitioners did furnish some services to the car owner in connection with the space rented and such services were within the meaning of the Act, and even if the Administrator had authority to regulate the charges for such services, his authority would extend only to the regulation of the charges for the services and not to the charges for the rental of the space. The Administrator in this proceeding has undertaken to fix maximum charges not for services but for space rental.

(5) Petitioners are not operating a service establishment within the meaning of the Act.

Argument.

I.

The Emergency Price Control Act deals with the control of rents on housing accommodations in defense areas and the prices of commodities.

The provisions in regard to rents make it clear that no control is to be exercised on rents except for defense area housing accommodations. U. S. C. A., Title 50, Section 902 (b). The term "defense-rental area" is defined as meaning 'The District of Columbia and any area designated by the Administrator as an area where defense activities have resulted or threatened to result in an increase in the rents for housing accommodations inconsistent with the purposes of this Act." The term "housing accommodations" is defined as meaning "any building, structure, or part thereof, or land appurtenant thereto, or any other real or personal property rented or offered for rent for living or dwelling purposes (including houses, apartments, hotels, rooming or boarding house accommodations, and other properties used for living or dwelling purposes) together with all privileges, services, furnishings, furniture and facilities connected with the use or occupancy of such property." The term "rent" is defined as meaning "the consideration demanded or received in connection with the use or occupancy or the transfer of a lease of any housing accommodations." U. S. C. A., Title 50, Section 942 (d), (f) and (g).

The Act is very specific as to the rents covered thereby and is just as effective to prohibit the exercise of control over rent not covered as if Congress had expressly stated that the Administrator should have no authority to exercise any control over any other rents.

The rental of the vacant space known as Lot 1014 Main Street, Dallas, Texas, is not subject to the Act. It is not a housing accommodation for residential purposes. If the space included in the lot is subdivided into 50 small tracts and petitioners rent one of these small tracts for a year, a month, a day or an hour, this rental is clearly not subject to the Act. If a car owner wishes to rent one of these spaces and agrees with the petitioners that he will select an unoccupied space and rent it for an agreed time at an agreed price, the transaction is still unquestionably a rental of real estate. The car owner designates the space he wishes to rent by placing his car thereon and the transaction is nothing more nor less than a complete rental of real estate.

The Administrator cannot enlarge the Act of Congress and he is fundamentally without authority to directly or indirectly exercise any control over rents that are so clearly excluded from the Act. The Administrator's limitations in this respect were discussed by the Emergency Court of Appeals in *Automatic Fire Alarm Company v. Bowles, Administrator,* 143 F.2d 602, 606. See also *R. E. Schanzer v. Bowles, Administrator,* 141 F.2d 262, 265.

II.

Park & Lock Space Rental cannot be regulated or controlled by the Administrator on the theory that real estate is a "commodity" or the renting thereof is a "commodity."

It seems that the Administrator contends that petitioners' leasing of *Park & Lock Space* areas to the owners of cars is the selling or leasing of a "commodity" within the meaning of the Act, but there is no basis for such a contention. The Emergency Court of Appeals has expressly held in *Automatic Fire Alarm Company v. Bowles, Administrator,* 143 Fed.2d 602, 606 that real estate is not a commodity and the selling or leasing of real estate cannot constitute the sale or rental of a commodity.

The Administrator bases his contention on the theory that it constitutes either "services rendered otherwise than as an employee in connection with * * * storage * * * of a commodity, or in connection with the operation of a service establishment for the service of a commodity." (R. 72.)

"Storage" of a commodity, as that term is used in the Act, means the act of a bailor in placing the commodity in the hands of a bailee for safekeeping. This meaning is the primary meaning given in the dictionaries and is also the generally accepted meaning of the term as it is used in commercial circles. The Administrator says that the definition of the verb "store," as contained in Funk & Wagnall's New

Standard Dictionary, 1940, is: "To put away for future use, especially for future consumption" (R. 75). He does not quote any definition of the noun "storage" and it is quite evident that in using the word "storage" Congress intended that its generally accepted commercial meaning should apply. The meaning contended for by the Administrator would produce fantastic and absurd results, as we will hereafter show.

"Storage" is so generally understood as the keeping of commodities belonging to another in a warehouse or other depository that the various states have passed "Uniform Warehouse Receipts Acts" regulating storage so that the laws relating thereto may be uniform throughout the United States. Texas is one of the states which has passed this "Uniform Warehouse Receipts Act." Revised Statutes, Articles 5612-5665. The storer takes the goods into his custody as bailee and retains them in his custody and safekeeping until the bailor presents the warehouse receipt and demands possession. Unless the relation between the storer and the owner is one of bailment the transaction is evidently not "storage" within the meaning of the Act.

No Safekeeping Involved in Park & Lock Space Rental

Certainly those customers placing their cars on the lot when no attendant at all is on duty and complying with the directions on signs and printed envelopes

to place their money in an envelope and drop in office door have no idea that the relationship between them and the proprietor of the *Park & Lock Space Rental* lot involves any safe keeping of the automobile. Who can such customer expect to handle such safe keeping? No attendant is on duty and the customer knows that no attendant will be on duty. He would be indulging a most unwarranted assumption to consider that his automobile constitutes the subject matter of any contract between him and the owner of the lot. The customer understands that he is only renting a place to put his automobile, and he takes the key out of the car, places it in his pocket, and intends that no one else (not the lot operator or any of his employees) shall have possession of that car while he is gone.

The charges which the Administrator undertakes to regulate in this proceeding are space rental charges and not charges made by a bailee to a bailor for the custody and safe keeping of the bailor's property.

According to the contention of the Administrator if a lessee rents a building and keeps a commodity therein, this constitutes "storage" within the meaning of the Act. Of the huge number of buildings rented in the United States it would be hard to find one in which the lessee does not keep many commodities for future use or consumption, and this, according to the Administrator, would make the rental of practically every building in this country subject to regulation by the Administrator. If this theory is correct and the rental of practically every building in the

United States is subject to regulation by the Administrator, why did Congress make special provision for control of the rent of residential housing accommodations in defense areas? The fact that Congress saw fit to make special provision for the rent of residential housing accommodations shows conclusively that Congress did not use the word "storage" with a meaning which would make the rental of all houses, business as well as residential, subject to the Act on the theory that they constituted sales of services connected with storage.

In *Automatic Fire Alarm Company v. Bowles, Administrator,* 143 Fed.2d 602, 606, the Emergency Court of Appeals says:

> "That the Administrator himself recognized that the words 'maintain' and 'repair' are not synonymous is indicated by the fact that he used them both in the amended regulation, for if the words were synonymous it would have been enough for him to have used but one of them and the use of both would have been wholly unnecessary. Having used the statutory word 'repair' he covered the whole ground allotted to him by the Act."

By the same reasoning if Congress had intended by its definition of "commodity" to include all rents where the lessee keeps any commodity or commodities in the rented premises, it would not have included this "rent" section in the Act.

> "An administrative regulation may not be used to amend the plain terms of a statute under the

guise of interpreting it." *R. E. Schanzer v. Bowles, Administrator,* Emergency Court of Appeals, 141 F.2d 262, 265.

Furthermore, so far as we have been able to ascertain, the Administrator has never attempted to exercise control over the rental of business property on the ground that the lessees keep therein for future use or consumption stocks of commodities other than the current stocks on the counters and shelves.

It would appear from page 129 of the transcript that the Emergency Court is of the opinion that the furnishing by petitioners of a service or services in connection with the space rental is essential to the Administrator's right to regulate the charge for the space rental. Petitioners do not furnish any services whatever. The situation is exactly the same as in the case of *Lancashire & Y. R. Co. v. Grillow,* L. R. 7 H. L. (Eng.) 517 (1875).

There the Court said:

> "If a man lets to me an acre of ground for the purpose of my placing my goods or minerals upon it, or if he gives me a license to place my goods or minerals upon a limited portion of his land or siding, that may be a matter into which he and I may enter into an agreement, and for which payment may be made; but it is not within the parliamentary power, to be termed a 'service performed,' by me for him."

The Administrator says the petitioners have currently one employee, a cashier, who collects rentals but performs no other services whatever, but that

it is hard to conceive of the cashier's duties as being limited to collection of rentals. (R. 75.) Petitioners have a perfect right to rent space to a car owner with the understanding that petitioners have no right to control his car and no further responsibility in connection with the car than if it were parked on the street in a parking meter space. There is no law that forces a lessor to assume any responsibility and the Act expressly provides that nothing therein shall be construed to require any person to sell any commodity or to offer any accommodation for rent. U. S. C. A. Title 50, Section 904(d). But if petitioners did furnish some service in connection with the space rental this could at most give the Administrator authority to regulate the charge for such service but would not authorize him to regulate the charge for the rent of the space. The Administrator, however, makes no attempt to regulate any charges for this non-existent service, and confines his attempted regulation to the rental charges for the space. In this connection it will be noted that at times the petitioners do not have a cashier on the premises, and the lessee merely deposits the space rental in a receptacle provided for that purpose [paragraph V (d) of the complaint (R. 113) admitted by the answer (R. 117).] The Administrator does not differentiate between a rental with no employee on the premises and one where a cashier collects.

Courts for many years have held operators of parking lots and storage garages liable as under the bailor-bailee relationship. These cases involved loss or

damage to the bailed article during the period of bailment. 131 A. L. R. 1176 *et seq.* But *Park & Lock Space Rental* is not a bailment. *Porter v. Los Angeles Turf Club, Inc.,* 40 Cal. App. Supp. (2) 840, 105 P. (2d) 956. Also 6 Am. Juris. p. 189. *Ex Parte Mobile Light & R. Co.,* 211 Ala. 525, 101 So. 177. *Panhandle South Plains Fair Association v. Chappell* (Texas Court of Civil Appeals—Amarillo), 142 S. W.2d 934.

The only relationship that can be established when the customer retains exclusive control of a space without restriction to possession and without supervision of the transfer of same is the relationship of landlord and tenant. *Cornelius v. Berinstein et al.* (Sup. Court of N. Y.), 50 N.Y.S.2d 186.

Non-Bailment Cases Examined

All the cases cited above, supra, give recognition to the fact that the parking of a car does not have the same connotation of safe-keeping of goods that goes with the storage of a car. All of the cases above cited rule out the bailor-bailee relationship in a fact situation where the custody of the car is retained in that the keys to same are kept by the owner and the operator of the parking lot does not have possession of the keys nor to that extent have possession of the car. See also *Lessor v. Jones* (1920) 47 N. B. 318, 52 D. L. R. 523 and *Zweeres v. Thibault* (Vt. Sup. Ct.) 112 Vt. 264, 23 A (2d) 529, 138 A. L. R. 1131.

The cases interpreting the word "storage" have,

where the question was pertinent to the issue, held that permanency or at least more than transient placing of goods is necessary to constitute storage. *Hood v. Judkins,* 28 N. W. 689, 61 Michigan 575, where it was said that if material was placed "merely for convenience in loading and shipping and for a merely temporary purpose, it could not be held to be stored." *Monument Garage Corporation v. Levy,* 266 N. Y. 339, 194 N. E. 848, where parking and storing were distinguished, the court saying that "parking is the temporary standing of a motor vehicle unattended by a person capable of operating same." The court pointed out that storage had the connotation of permanency while parking connoted transience. Peculiarly enough the Emergency Court of Appeals cited both of these cases (R. 129, footnote 6) as authority for the proposition that what is meant by "storage" must be sought in the context of the statute where it is used. The Emergency Court did not use the same reasoning exhibited by it in *Automatic Fire Alarm Company v. Bowles,* 143 Fed.2d 602 at 605 where it stated: "Services are not commodities in the ordinary and accepted meaning of the term and they are, therefore, not within the spirit or purpose of the Act except to the extent that they are expressly directed by the Act to be considered as commodities." This statement could well have been paraphrased to apply to "storage" as well as to "services". Storage is not a commodity in the ordinary and accepted meaning of that term. Neither is "parking" storage within the ordinary and accepted meaning of that term and to make parking synony-

mous with storage is not within the spirit or purpose of the Act because the Act does not expressly direct that parking be considered the same as storage.

"Parking" and "storage" have been distinguished in many cases. *Monument Garage Corporation v. Levy,* supra, *Bazinsky v. Kesbec, Inc.,* 259 App. Div. 467, 19 N. Y. S. (2d) 716, *Gilsey Buildings, Inc., v. Incorporated Village,* 170 Misc. 945, 11 N. Y. S. (2d) 694, *Williams v. Grier,* (Sup. Court of Georgia) 26 S. E. (2d) 698, *Smith v. O'Brien,* 94 N. Y. S. (2d) 673, *Bowen v. Hider,* 37 N. Y. S. (2d) 76. In fact, no case has been discovered where "parking" and "storing" means the same thing. All of the examination into the meaning of the terms has resulted in courts uniformly differentiating and pointing out that "storing" has the connotation of permanency while "parking" connotes a transient use.

The mere providing of a space for another to place his goods upon is not storage service rendered to the person making the deposit. *Lancashire & Y. R. Co. v. Grillow,* supra; *Walker v. Norfolk & Western Railroad Co.,* 67 S. E. 722, and *Chicago & Great Western Railway Company v. Davis,* 1 Fed.2d 729 where the court said: "The posts in question were not placed or stored in a depot or warehouse or other enclosure. They were not guarded or kept under any supervision —they were in short, exposed to every hazard against which storage is intended to guard."

LANGUAGE OF PARTICULAR PARKING TAG CONTROLS RELATIONSHIP.

Porter v. Los Angeles Turf Club, Inc., supra, involved a ticket which read: "AUTO PARK THIS TICKET LICENSES THE HOLDER TO PARK ONE AUTOMOBILE IN THIS AREA LOCK YOUR CAR NOT RESPONSIBLE FOR THEFT, FIRE OR DAMAGE TO ANY CAR OR ARTICLE LEFT IN SAME." The courts gave credence to the theory set out on the unpunctuated ticket and stated that the relationship was one of a licensor granting a license to come withi an enclosure.

Ex Parte Mobile Light & R. Co., supra, says concerning the claim check: "This check has an element of contract defining the subject matter of the transaction and the duties of the respective parties." As the check issued purported on its face to grant a license the court did not belabor the question of whether the resulting relationship was one of licensor-licensee or of landlord-tenant.

It can make no difference in this case whether the relation between petitioners and the car owner is that of landlord and tenant or licensor and licensee. In either event the space rental is not subject to the Act. It seems clear, however, that the actual relationship is that of landlord and tenant since the car owner has the exclusive right to occupy the space allotted to him during the time for which he pays, and this right of possession makes him a tenant and not a licensee. *N. Y.*

St. L. & C. Ry Co. v. Randall, 102 Ind. 453, 26 N. E. 122; *Ogus, Robinovich & Ogus v. Foley Bros D. G. Co.,* 252 S. W. 1048.

6 Am. Jur. at page 189, under paragraph 60, Title, Bailment, has this to say enlarging upon the *Ex Parte Mobile Light & R. Company* case:

> "Usually there is a bailment when an automobile is delivered to attendants at a parking station, although the transaction amounts to a mere rental of parking space, where the circumstances negative a delivery of possession or an intention to leave the car in the care and charge of the properietors."

The same text, paragraph 59, says:

> "A tenant, but not a bailor, has the exclusive possession and control of, and dominion over, the portion of the other party's premises where the goods are kept, for the duration of the term of his lease" * * * * * * * * "

All that was necessary to be decided in any of the cases cited above was whether or not the relationship existing between the owner of the car and the owner of the park was or was not a bailment. That the *Alabama* case and the *California* case went further and announced the relationship to be one of licensor-licensee did no more than give effect to the particular claim checks issued or receipts issued in the particular cases. In the *Panhandle South Plains Fair Association* case (Texas Civil Appeals), supra, no claim check or receipt appears to have been issued, and no pronouncement was made by the court as to whether a

licensor-licensee relationship resulted or a landlord-tenant relationship. Since the only thing necessary to decide from the point of view of the court in that case was the question of bailment it would have been a moot question to have announced what the relationship resulting actually might be.

NATURE OF RELATIONSHIP DETERMINED BY SUBJECT MATTER OF CONTRACT—AUTHORITIES

138 A. L. R. 1137 at page 1139 reads as follows:

> "The owner of a private garage with whom another makes an arrangement to pay him a certain amount per month to store his car therein, the car owner being given a key to the garage, to enable him at any hour of the day or night he sees fit, to remove and return his car as he chooses without the knowledge of the owner of the garage, is not a bailee, as there is no delivery of the car to him and by the arrangement the owner of the car does nothing more than rent space in the garage in which to store his car. Lessor v. Jones, 1920, 47 N. B. 318, 52 D. L. R. 523."

138 A. L. R. 1137 contains references to other cases where a landlord and tenant relationship was determined to exist rather than a bailment relationship as contended for by one of the litigants. Two cases of this nature referred to and summarized in the annotation are: *Bash v. Reading Cold Storage & Ice Co.* (1930) 100 Pa. Super. Ct. 359 and *Gruber v. Pacific State Saving & Loan Co.* (1939) 13 Cal.2d 144, 88 Pacific2d 137. This annotation also makes reference to

6 Amer. Jur., Section 59, Bailment, *supra*, p. 18. Further reference to this text shows the following quotation which is helpful in the present case:

> "In cases where the question of differentiation may arise, the subject matter of the contract is the rental of the place where the goods are deposited if the relation is that of landlord and tenant, while the subject matter is laways personal property in case of a bailment. Perhaps with this in mind the courts often given consideration in doubtful cases to the manifested intention of the parties—whether the care of personal property or only the rental of a place to put it was contemplated."

LANGUAGE OF PARKING TAG IN PRESENT CONTROVERSY DISTINGUISHES RELATION AS LANDLORD-TENANT

In the time tickets issued by petitioners on the *Park & Lock Space Rental* arrangement no reference to license is made. Rather, there is a statement "RATE FOR SPACE RENTAL DEPENDS UPON TIME SPACE IS OCCUPIED." Petitioners' Exhibit A, being a copy of O. P. A. form 265:3, APPLICATION FOR APPROVAL OF A MAXIMUM PRICE FOR A NEW SERVICE, which was filed by Allright Parking System, Limited, carries under Item 3 on the first page thereof (R. 11) reference to "Single section time tickets similar to the sample attached." The court in considering the problem should consider the language of the tickets issued by the parking lot operator and accepted by the automobile owner as, (to borrow from the Alabama Court's opinion *Ex Parte Mobile Light & R. Co., supra*) having "an element of contract defining the subject mat-

ter of the transaction and the duties of the respective parties."

Extra copies of the single section time ticket have been filed herein (R. 124) in connection with Application For Leave to Introduce Additional Evidence filed 11/27/44, and order of Dec. 6, 1944. (R. 118-124).

On those occasions when a cashier is on duty the rights of the parties are controlled by the wording in the time receipts or checks issued by the cashier. For the court to give consideration to the manifest intention of the parties (such procedure being suggested in quotation from American Jurisprudence set out supra) requires the contents of the ticket to be looked to. Whatever contract arises in that situation has for its subject matter not personal property, the automobile, but the space occupied by the automobile.

PARK AND LOCK SPACE RENTAL IS NOT A SERVICE

The Administrator takes the position in his opinion of May 31st., 1944 (R. 74, 76) that *Park & Lock Space Rental* is a service. However, no service whatever is furnished. Petitioners do not place the automobile for the owner; they do not watch it, safeguard it or insure it; the owner himself selects the space he is to rent, parks and locks his own car, and assumes as full responsibility as if the car were parked on the street. The car owner never relinquishes any custody or control of his car or of the space it occupies during the rental period and petitioners never have the car in their custody or control. The contention that peti-

tioners are rendering services is entirely without support in the record.

The Emergency Court holds (R. 129) that the marking of lines to define the space rented to each car owner, cleaning up and keeping in condition the lot under lease by petitioners, the provision of lights and of a common entrance and exit are services, and that they therefore come within the provision which says that the term "commodity also includes services rendered otherwise than an employee in connection with * * * * the storage * * * * of a commodity." This contention is not well taken. What petitioners' employees do to protect or render more useful or attractive their own property is not within the definition, and if services are rendered by employees they are not rendered to the car owner but to the petitioners. *Automatic Fire Alarm Company v. Bowles, Administrator,* 143 Fed.2d 602, 605.

In office buildings the landlords keep the buildings clean, the corridors lighted, the elevators in operation, the rented space lighted, heated and often cooled, and the sidewalks clean, and maintain rest rooms for the tenants. The tenants place many commodities in these buildings, including commodities for future use and future consumption. This is true in the ordinary office buildings and especially true in what are known as loft buildings. Certainly Congress did not intend that the rentals charged by the landlords for space in these buildings should be subject to control by the Administrator.

A manufacturer uses part of his rented space to put away manufactured articles for future sale and his reserve stock of raw materials for future use. This does not make the rental he pays to his landlord subject to the Act. The retail merchant uses part of the space he rents to put away for future use his reserve stock of fuel and his reserve stock of merchandise for future sale to replenish the shelves and counters when they need replenishing. This does not give the Administrator control over the rent the merchant pays his landlord. The examples could be multiplied ad infinitum reducing the contention of the Administrator *ad absurdum*. If "storage," as used in the Act, means what the Administrator contends it means, then there exists no such thing as a space rental not covered by the Act.

What constitutes a "service establishment" has been discussed at length in decisions under the Wages and Hours law (The Fair Labor Standards Act of 1932, 29 U. S. C. A. Chapter 8), *Fleming v. Arsenal Building Corporation,* 125 Federal (2) 278, certiorari granted, 1942, 62 Sup. Ct. 801, 315 U. S. 792, 86 L. Ed. 1195, affirmed, *Arsenal Building Corporation v. Walling,* 1942, 62 Sup. Ct. 1116, 316 U. S. 517, 86 L. Ed. 1638; *Fleming v. A. B. Kirschbaum Company,* 38 Fed. Supp. 204, certiorari granted, 1942, 62 Sup. Ct. 800, 315 U.S. 792, 86 L.Ed. 1195, affirmed, *Kirschbaum v. Walling,* 1942, 62 Sup. Ct. 1116, 316 U. S. 517, 86 L. Ed. 1638 and other cases cited at 29 U. S. C. A. par. 213, note 10. See especially the C.C.A. opinion in *Fleming v. Kirschbaum at* 124 F.2d 567 at p. 572.

"We agree with the District Court that the defendant's business, (that of operating a loft building) is not a service establishment. It may be conceded that the defendant's employees render service to the tenants but this service is merely incidental to the business of the defendant which is that of leasing space in its building rather than of selling service. The rendering of some service is incidental to most businesses but they are not thereby necessarily stamped as service establishments."

The Supreme Court speaking through Justice Frankfurter in the combined cases of *Walling v. Kirschbaum Co.* and *Walling v. Arsenal Building Corp.*, supra, had this to say (316 U. S. at 526):

> "The petitioners' buildings cannot be regarded as "service establishments" within the exemption of paragraph 13(a) (2). Selling space in a loft building is not the equivalent of selling services to consumers * * * "

The Supreme Court affirms the holding of the lower court and, to that extent, endorses the language in the Circuit Court of Appeals opinion quoted supra.

CONGRESS HAD THESE DEFINITIONS OF "SERVICE" AND "SERVICE ESTABLISHMENT" IN MIND WHEN EMERGENCY PRICE CONTROL ACT WAS WRITTEN.

The Administrator has contended that the word "service" has been interpreted by the petitioners as applicable only within narrowly defined limits (R. 74). It is a well recognized rule of construction that "When a legislative body selects and uses in a statute

words or clauses which before the enactment of the law had acquired by judicial interpretation or common consent and use a well understood meaning and legal effect, the legal presumption is that it intended that they should have that meaning and effect in the statute it enacts." *Thorn et al v. Browne,* 257 Federal 519 (Circuit Court of Appeals, 8th Circuit). Writ cert. denied 250 U. S. 645; 39 Sup. Ct. 494, 63 L. Ed. 1187. After the terms "service" and "service establishment" have been so exhaustively analyzed and discussed, judicially defined, both positively and negatively, in the Wage and Hour cases, it ill behooves the Administrator to claim that petitioners have interpreted the terms within narrowly defined limits.

JUDICIAL DEFINITIONS SHOWING PARK AND LOCK TO BE OUTSIDE THE TERMS SO DEFINED.

The case of *Guess v. Montague,* 51 Fed. Supp. 61 at page 65 defines "service establishment" as having "reference to a business in which the owner thereof renders some character of service, at an established location, to members of the general public, in consideration of a charge to be made therefor." The same opinion defines "service" as used in the Wage and Hour Act in the sense in which it means the "supplying of labor or skill for the benefit of others as a business." That case was reversed on other grounds in the Circuit Court of Appeals, 140 Fed.2d 500, but the definitions of "service" and of "service establishment" were not questioned. It cannot be said thatthe operator of a *Park & Lock Space Rental* lot is in

any sense furnishing labor or skill for the benefit of others as a business. He is only furnishing space, and the elements of both labor and skill have been removed from the operation.

Physical Similarities—Park and Lock Similar to Loft Building.

All of the wage and hour cases are most helpful. Nowhere among their definitions of "service" and "service establishment" can be found any which would encompass *Park and Lock Space Rental.* However particular attention is directed to those cases cited supra having to do with the operation of loft buildings as being germane to our discussion. The situation on a *Park and Lock Rental* operation is very similar in a simplified sort of way to the relationship obtaining between tenant of a loft building and the owner of that building. The customer availing himself of *Park and Lock Space Rental* facilities does so, not to secure storage or safekeeping, not to avail himself of a servicing as he would when placing his automobile with a repair garage or with the ordinary storage garage where possession of the automobile is surrendered to the storage garage operator—rather does the customer place his car on a small part of the park, "a piece of land reserved" to use the literal meaning of the word, in the same way that an office building tenant places his desk and chair in the office which he has rented. That office building tenant does not place his furniture in the office for the purpose of securing the services of dusting and sweeping which might be of-

fered in connection with his rental of that office. Neither does the *Park and Lock Space Rental* customer place his automobile on the lot for any purpose other than the actual use of that particular space for that particular purpose. Both the tenant in the office building and the *Park and Lock Space Rental* customer expect to have rights of ingress and egress assured to them by the landlord, but because joint hallways are made available for the common use of all tenants in the building or for the common use of all users of space on the *Park and Lock Space Rental* arrangement, neither the owner of the office building nor the operator of the *Park and Lock Space Rental* arrangement is thereby furnishing a service and neither is operating a "service establishment."

Administrator Attempts Regulation of Retail Park and Lock Rental But Not Regulation of Wholesale Rental.

Wherever Congress has authorized the regulation of the retail price of a commodity it has also authorized the regulation of the wholesale price. Petitioners rent a large space and subdivide it into 50 smaller spaces which they in turn rent to car owners. The Administrator makes no attempt to control the wholesale rental paid by petitioners, but undertakes to control the retail rentals paid by the car owners to petitioners. Certainly Congress would not have undertaken to regulate the retail rentals without at the same time regulating the wholesale rentals. Acting on the theory that the price per square foot paid by petitioners to

their lessor was immaterial, the Administrator first held that because a Mr. Shoemaker rented space sufficient to hold a car for 10c per day that was all that petitioners could charge for the same amount of space, notwithstanding the fact that petitioners were paying more than ten times as much per square foot for the space rented by them as Shoemaker was paying for his space, and Shoemaker's space was 22 blocks away in the suburbs while petitioners' space was in the heart of the business section (R. 29, 51). The Administrator modified the order of the District Director and fixed the price per day that could be charged by petitioners at 2½ times the price charged by Shoemaker. The Administrator's idea seems to be that the rental paid to the land owner is not within his jurisdiction and therefore it is immaterial that he is attempting to require property costing ten times as much in rental as the Shoemaker space to be rented for 2½ times the Shoemaker rental (R. 79). Certainly if there are two possible interpretations of the Act the interpretation which produces such weird results should not be adopted. Congress evidently had no such intention when the Act was passed.

It was stated a few days ago in the press that the Emperor Diocletian inaugurated a price regulation system whereby the prices of commodities were fixed but no provision was made for any profit in transactions between the manufacturer and the wholesaler or between the wholesaler and the retailer. According to the press report the Emperor's experiment was such a colossal failure that he decided he had rather raise

spinach than be Emperor. Congress must not have intended to adopt any such impractical system.

To summarize, petitioners rely mainly upon the nature of the *Park and Lock Space Rental* relationship to identify it as something outside of the Act—not a service and not the operation of a service establishment for the servicing of a commodity. The language of the contract (single section time ticket) helps to bear out the argument of the landlord-tenant relationship advanced from the bare physical facts of the situation. Consideration of the terms used in the Emergency Price Control Act, when taken in connection with the judicial definition and accepted meaning of such terms (especially in the Wage and Hour cases) will lead, as petitioners view the case, to the inescapable conclusion that *Park and Lock Space Rental* is not such activity as is subject to regulation under the Emergency Price Control Act.

WHEREFORE, your petitioners pray that a writ of certiorari issue out of and under the seal of this court, directed to the United States Emergency Court of Appeals, commanding that court to certify this cause to this court for review and determination, as provided by the acts of Congress; that on a hearing the judgment of the United States Emergency Court of Appeals be set aside and judgment be here rendered enjoining and setting aside the regulations, orders and price schedules herein referred to, especially in so far as they attempt to control and regulate the rental of *Park & Lock Space* by petitioners, as afore-

said, and petitioners' charges therefor; that this court render such judgment as should have been rendered by the United States Emergency Court of Appeals or, in the alternative, that it reverse the judgment of the United States Emergency Court of Appeals and remand the cause with further instructions; and that petitioners have such other and further relief as to this court may seem appropriate and proper.

Walter F. Brown

WALTER F. BROWN

Durell Carothers

DURELL CAROTHERS

Attorneys for Petitioners.

P. O. Address:
2111 Esperson Bldg.,
Houston 2, Texas.